IN THE

Supreme Court of the United States

OCTOBER TERM 1983

No. 82-1966

ANICETAS SIMUTIS, individually and as Consul General of Republic of Lithuania at New York, New York,

Petitioner,

—against—

BORIS PRANAS DANIUNAS and AUGUSTINAS-VITAUTAS AUGUSTINOVICH MOREUNAS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Should this Court grant *certiorari* to review the outcome of a pre-answer motion to dismiss which was not a final-determination?

2. Does New York, SCPA 2218 conflict with the doctrine of Federal supremacy in foreign policy areas?

TABLE OF CONTENTS

Table of Authorities

Other Authorities

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This brief is submitted on behalf of the respondents in opposition to the petition, filed by the petitioner, who was the defendant-appellee below, for a writ of *certiorari* to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered on March 18, 1983.

That judgment reversed the decision of the United States District Court for the Southern District of New York, which had held that a prior action between the parties had been concluded in such a manner as to be *res judicata* to further proceedings and that the respondents, who were the plaintiffs-appellants below, had imposed upon the petitioner and upon the Court to such an

extent that respondents' counsel was ordered to pay the petitioner's costs and his attorney's fees.

Statement of the Case

The case at bar, in which the petitioner seeks a writ of *certiorari*, had as its origins the Estate of John Daniunas, who died intestate in Maryland in 1931, leaving as his sole heir Aniele Daniuniene, citizen and resident of Lithuania.

An administrator was appointed in the Daniunas estate and from 1934 until 1945 he filed six accounts and made six distributions to the Consul General of Lithuania on behalf of the heir. (A-17)* The position of Consul General was held by two different successive individuals during this period, I. P. Zadeikis and Jonas Budrys. The present petitioner is their successor. (A-17)

The distributions made under the Fifth and Sixth Accounts were never sent to Aniele Daniuniene. The total amount, with the interest awarded by the District Court, is $5,598.15. The heir subsequently died in Lithuania leaving as her heirs the respondents who are citizens and residents of the Lithuanian SSR. (A-17)

The respondents brought suit against the petitioner in 1975 claiming entitlement to the estate funds he was holding. Throughout 1976 and most of 1977, pretrial discovery took place, including attempts by the petitioner to depose one Anna Walatkus, a resident of Baltimore, Maryland. (A-20) The petitioner had alleged that Walatkus was another heir of Aniele Daniuniene. (A-20) There were numerous unsuccessful attempts to depose Walatkus but no proof was ever presented to support the allegations

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* References are to Petitioner's Petition for Writ of Certiorari. The Petition is not numbered after page A-15. Respondent has treated those pages which follow A-15 as A-16 through A-26.

and this claim was never withdrawn or otherwise disposed of. (A-20)

A trial was held on June 21, 1978 before Judge Robert W. Sweet. The petitioner challenged the power of attorney which the respondents in Lithuania had issued to their New York counsel. This objection was overruled and the powers of attorney were ultimately recognized. (A-18)

The evidence of the devolution of Aniele Daniune's estate to her heirs was in the form of a fully authenticated Certificate of Right to Inherit. The petitioner objected to the authentication process on the grounds that the Certificate was an act of an unrecognized government. The objection was overruled and the Certificate was found to be determinative of the heirs who resided in Lithuania. (A-20) The District Court retained the "ability to give recognition to those heirs residing outside of Lithuania and who have satisfied this Court as to the validity of their claim." (A-20)

In connection with the Certificate of Right to Inherit the court also noted the aforementioned claim of Anna Walatkus. The court did not, however, reject the claim. Based upon the evidence (or lack thereof), the court was "unable to find that she is entitled to participate in any distribution of the estate" (A-20). This issue was never resolved.

The final objection raised by the petitioner was that the respondents would not enjoy the benefit, use and control of the funds. Since there was no applicable federal law and New York was the situs of the funds, the District Court applied New York's Surrogate's Court Procedure Act Section 2218 (hereinafter referred as "SCPA 2218"). (A-21) This objection was not raised until the trial before Judge Sweet. (A-21)

Both counsel addressed the issue of use, benefit and control in memoranda of law which were submitted to the court in July and August of 1978. The trial was concluded on August 28, 1978. Judge Sweet's opinion was rendered October 18, 1978. The court found that the Walatkus claim was unsubstantiated and the respondents' proof regarding benefit, use and control was not properly in evidence. The court did not totally reject any claim, however, finding that:

> The authorities cited by counsel for the plaintiffs do support the proposition that citizens of the USSR, in general, receive use or benefit or control of monies distributed to them from foreign legacies. However, the attorney for the plaintiffs has submitted nothing to this court to establish that these particular plaintiffs will be able to control, use, or benefit from the monies in question. Even assuming this court could consider the letter from the Department of State, there has been no showing that these plaintiffs are so physically located, or otherwise capable of taking advantage of the monies, so as to make purchases through "Vnesphosyltorg". (A-22)
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> Whether or not these plaintiffs will receive the use or benefit or control of the monies is a question of fact, not of law. Even if the cases cited by counsel for the plaintiffs satisfied this court that Soviet citizens generally have in the past received the use or benefit or control of foreign monies distributed to them, counsel has submitted nothing to this court establishing the continuation of this practice or that it will be applied to these Lithuanian plaintiffs. Similarly, no probative evidence has been introduced on behalf of the defendant to demonstrate his capacity to

represent the claimants or to assure this court that he can place the fund in the hands of the heirs in Lithuania." (A-23)

The action was dismissed. The monies were to be retained by the Clerk of the District Court ". . . pursuant to Section 2218 of the New York Surrogate's Court Act for the benefit of all those who may hereafter appear entitled thereto". (A-23)

A judgment was thereafter entered which contains the words "Plaintiffs take nothing" and further specifies that the fund be held by the Clerk of the Court for the "Consulate General of Lithuania, as Trustee and Attorney-In-Fact for Mrs. Aniele Daniuniene, a national of Lithuania and designated as a blocked account under Executive Order 8389, as amended, and the regulations of the United States Treasury Department, and that the fund not be released until specific United States Treasury licenses have been obtained and filed with the court." Nowhere in the opinion can this language be found. Such a result is not even intimated. The opinion clearly states that the retention of the funds was simply for *'all those who may hereafter appear entitled thereto.'* (emphasis added). The Court of Appeals has agreed that this was the intended result. (A-3)

In January of 1981 the petitioner initiated correspondence with the Clerk of the District Court to ascertain the place of deposit of the funds. No copies of this, or the ensuing correspondence were ever sent to counsel for the respondents. The result of the correspondence was the entry of an *ex parte* order on December 16, 1981 directing payment of the funds to "Anicetas Simutis, Consul General of Lithuania, as Trustee and Attorney-In-Fact for Mrs. Aniele Daniuniene." (A-7). This order was obtained even though it is clear from Judge Sweet's opinion that

"The sole heir of John Daniunas was Aniele Daniuniene, who died intestate in Lithuania". (A-17)

Following the receipt of the order of December 16, 1981, an action was commenced against Anicetas Simutis for the recovery of the funds by service of a summons and complaint dated April 7, 1982. As the petitioner had regained control over the funds this action was the only remedy respondents had to show to the District Court that they were the parties entitled thereto.

The petitioner answered the complaint with a general denial and the affirmative defense that the dismissal of the prior action had the effect of *res judicata*. This affirmative defense was made the ground for a motion to dismiss which resulted in the opinion of Judge Edelstein dated October 19, 1982 and the order of dismissal and judgment entered November 9, 1982 which was the subject of the respondents' appeal to the United States Court of Appeals for the Second Circuit.

The Proceedings Below

A. *The District Court.*

In its Memorandum Opinion dated October 19, 1982, the District Court granted the petitioner's motion to dismiss on the grounds of *res judicata*. The Court found that the same plaintiffs had brought an action against the same defendant to recover the same funds. The Court further found that there had been no change of facts since the prior dismissal and that the plaintiffs had no basis for the filing of a new suit.

The District Court also found that the plaintiffs had imposed upon the Court and the defendant; that the defendant had been harassed by the suit; and that the defendant had wasted money answering a frivolous suit. The

court dismissed the action and ordered the counsel for the plaintiffs to pay the reasonable costs of the action, including the defendant's attorney's fees.

B. *The Court of Appeals.*

The Court of Appeals found that the prior case tried by Judge Sweet had not resulted in final determination on all of the merits and that Judge Sweet had not intended his judgment to bar relitigation over entitlement to the fund. The Court found that New York's SCPA 2218 was the law of the case as far as the issue of benefit, use and control was concerned and, furthermore, that this finding created no conflict with the licensing requirements of the Trading with the Enemy Act.

Finding that the prior action was not *res judicata,* the Court of Appeals reversed the judgment of Judge Edelstein and remanded the case back to the District Court for further proceedings.

Reasons for Denying the Writ

Certiorari should be denied in this case. The determination by the Court of Appeals was not final. SCPA 2218 is not an unconstitutional intrusion into the area of foreign affairs.

1. *The Court of Appeals Has Not Made a Final Determination in This Case.*

The petitioner is asking this Court to review the outcome of a pre-answer motion to dismiss. The Court of Appeals remanded the case to the District Court for further litigation and "it is not yet ripe for review by this Court", *Brotherhood of Locomotive Firemen and Enginemen* v. *Bango & Aroostock R.R. Co.,* 389 U.S. 327 (1967) at 368.

If, as petitioner argues, Judge Sweet erred in applying New York's SCPA 2218, the time for appellate review is after a final determination has been made. Denial of the petition seeking permission to appeal this interlocutory decision will not in any way act as "an affirmance of the decree that is sought to be reviewed." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U.S. 251 (1916), at 271.

The Court is being asked to review a denial (by the Court of Appeals) of a motion to dismiss. Such a review is premature as this Court has said:

> "Had this motion been granted and judgment of dismissal been entered, clearly there would have been an end of the litigation and appeal would lie within Section 128. United States v. Marin, 9 Cir., 136 F.2d 388. But denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable. Cf. Roche v. Evaporated Milk Ass'n, *319 U.S. 21, 63 S.Ct. 938, 87* L.Ed. 1185. See also Dieckmann v. United States, 7 Cir., 88 F.2d 902. Certainly this is true whenever the question may be saved for disposition upon review of final judgment disposing of all issues involved in the litigation or in some other adequate manner."

Catlin v. *United States,* 324 U.S. 229 (1945) at 236.

2. *SCPA 2218 Does Not Unconstitutionally Intrude Into the Area of Foreign Affairs.*

It was the petitioner himself who raised the issue of benefit, use and control during the trial. (A-21) Judge Sweet, correctly noting that there is no specific federal statute dealing with the subject of benefit, use and control, applied the law of the situs of the funds, New York's SCPA 2218. (A-21) The relevant portion of that statute reads as follows:

"(2) Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction."

The petitioner's contention that SCPA 2218 unconstitutionally intrudes into the area of foreign affairs by restricting or modifying Executive Order 8389, as amended, issued pursuant to the Trading with the Enemy Act, 40 U.S. Stat. 411, Section 5(b), 31 U.S.C. 520, is without merit.

SCPA 2218 and the Trading with the Enemy Act have different objectives not inconsistent with each other. SCPA 2218 represents an expression of the state's public policy to protect the integrity of estate distributions and to implement the intent of testators. It seeks to make certain that distributees will have use, benefit and control of the property inherited by them. The Trading with the Enemy Act and Executive Order 8389 have nothing to do with the question of who is entitled to estate funds between contesting parties or whether a distributee will receive the benefit, use and control of his or her funds. It expresses the policy of the Federal Government, based on foreign policy considerations, that under certain circumstances property of any kind belonging to a national of designated foreign countries will be blocked and can be transferred only upon the issuance of a license.

As has been pointed out by the United States Treasury Department, the Trading with the Enemy Act contemplates

that where there is a dispute over entitlement as between two parties, that issue is to be resolved by the Judicial Branch of the Government—in this case, the Federal Judiciary applying state law. The Treasury Department's letter was cited by the Court of Appeals in ordering remand of this case to the District Court. (A-2, 3) It pointed out that upon presentation to the District Court of sufficient evidence to establish use, benefit and control the petitioner would obtain the necessary Treasury license to withdraw the funds. Thus, there is neither inconsistency between the federal and state statute nor does the state intrude into the area of foreign affairs.

This Court has never found that SCPA 2218, on its face, unconstitutionally intrudes into the federal domain of foreign affairs. *See, Clark* v. *Allen,* 331 U.S. 503 (1947); *Zschernig* v. *Miller,* 389 U.S. 429 (1968). A three-judge court of the United States District Court for the Southern District of New York interpreted the effect of this Court's decisions as follows:

> "The Clark and Zschernig decisions together can be construed to mean that statutes restricting the rights of alien beneficiaries to receive inheritances of United States citizens do not inherently constitute an intrusion into the foreign affairs area. At the same time, in applying such statutes, whether the law be a reciprocity provision or a benefit, use and control provision, they appear to warn the state courts not to inquire into or evaluate the administration of foreign law, or the credibility and policies of foreign governments. Thus, a court is limited to a 'routine reading' of a foreign country's laws or a 'just matching' of such laws with the laws of the state involved. Zschernig v. Miller, supra, 389 U.S. at 433, 88 S.Ct. 664; see Matter of Kish, 52 N.J. 454, 246 A.2d 1 (1968);

Note, Alien Succession under State Law: The Jurisdictional Conflict 20 Syr. L.Rev. 662, 673 (1969); Note, Foreign Affairs—Decedents' Estates, 3 Int'l Lawyer 701 (1969)."

Bijarsch v. *Difalco,* 814 F. Supp. 127, 133 U.S.D.C. N.Y. (1970).

Also, subsequent to this Court's decision in *Zschernig,* the Court of Appeals of the State of New York upheld the constitutionality of SCPA 2218. *Matter of Leikind,* 292 N.Y.S.2d 681, 685, 22 N.Y.2d 346, 351 (1968).

In any event, there has been no definitive application of SCPA 2218 to the facts of this case. All that has happened is that the Court of Appeals has remanded the case to the District Court so that the issue of benefit, use and control should be finally resolved. In doing so, it suggested to the District Judge, whose decision it reversed, that he might consider it be appropriate to refer the case to the original trial judge. (A-3) That reference has been made.

Although it was not an issue before the Court of Appeals, and is not a question raised on this appeal, petitioner argues that the decision of the District Court in recognizing for limited purposes a Certificate of Right to Inherit issued in Lithuania, gave credence to a political act of an unrecognized government, thus violating the doctrine of federal supremacy. That contention also lacks merit. Consistent with well-established precedents, Judge Sweet held that "A review of the documents submitted has satisfied this court that the Certificate of Right was properly authenticated in accordance with the laws of Lithuania. The authorities of the plaintiffs are persuasive as to the recognition to be given a private, as opposed to a political, act of an unrecognized sovereign. *In re Luberg's*

Estate, 19 App. Div. 2d 370, 243 N.Y.S.2d 747 (1st Dept. 1963); *see* generally, *Upright* v. *Mercury Business Machines Co.,* 13 App. Div. 36, 213 N.Y.S.2d 417 (1st Dept. 1961)." (A-19)

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit should be denied.

Dated: New York, New York
June 28, 1983

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